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Issues Ohio Non-Profit Employers May Face in Dealing with Out-of-State Remote Workers

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In part because of the COVID-19 pandemic, and advances in technologies such as Zoom, remote work is growing rapidly in the United States. As a result, employers of all kinds are becoming increasingly willing to hire employees who will work remotely from states other than those in which the employers themselves reside. Though convenient, these types of arrangements may bring about unexpected legal implications for employers. This article outlines several of the key issues Ohio non-profit employers may face in dealing with out-of-state remote workers. For demonstrative purposes, this article primarily compares Ohio laws with those of Maryland and Louisiana, though other states are referenced as well.

Local Employment Laws

Remote employees are generally subject to the laws of the city and state where they are physically located and perform work. Thus, out-of-state employers may need to familiarize themselves with the state and local employment laws of other jurisdictions, as a failure to comply with state and local posting requirements, leave entitlements, wage and hour laws, etc. can result in liability for lost wages, penalties, noneconomic damages, and attorneys' fees.

For example, state and local sick leave law entitlements vary depending upon the number of employees within the state, the duration of leave, and the type(s) of leave available. For instance, in Ohio, as in Louisiana, the law does not require private sector employers to provide sick leave - but if an agreement for sick leave is reached between the employer and the employee, it is enforceable. To the contrary, in Maryland, all employers with employees whose primary work location is in Maryland are required to provide earned [Sick and Safe leave](#), regardless of where the employer is located.

Wage and hour laws also vary by state, with some states offering more generous minimum wage, overtime, and rest and meal break benefits than others. For example, Ohio requires employers to pay minimum wage and overtime pay of at least time-and-a-half for all hours worked beyond 40 in a week, and Maryland does the same. Louisiana, however, does not have its own wage and hour laws - though Louisiana employers must comply with the federal Fair Labor Standards Act. A state-by-state overview of minimum wage and overtime regulations is available through the U.S. Department of Labor at [this link](#).

Laws governing vacation leave and many other aspects of employment also vary by state. Employers should also consider employee classifications, which can make a big difference with regard to employer requirements. For



example, executive-level positions are often considered “exempt,” meaning they are not subject to wage and hour laws. Employers who are unsure of the status of new employees are advised to consult with an attorney specializing in employment law for assistance with creating or reviewing employee job descriptions. Employers may also consider tracking remote employees’ hours of work to comply with Department of Labor [guidance](#).

Additionally, employers should consider the expense reimbursement requirements of the state where the remote workers are located. Generally, under the federal Fair Labor Standards Act (FLSA), employers are not required to reimburse employees for work-related expenses incurred working remotely. However, an important caveat to that rule is that an employer may be required to reimburse employees for work-related expenses that would cause the employee’s pay rate to fall below the required minimum wage. At least ten states – Illinois, California, Massachusetts, Montana, Pennsylvania, New York, New Hampshire, North Dakota, South Dakota, Iowa – and the District of Columbia have enacted laws requiring employers to reimburse employees for certain remote work expense. The more employee friendly states, such as California, require reimbursement for “all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” This is an important consideration for employers dealing with remote workers who may require computers, printers, and other office supplies to perform the functions of their job. Utilities such as internet can also be considered a business expense in some circumstances.

Foreign Business Qualification

Foreign business qualification becomes a relevant consideration when a non-profit corporation has employees working in a “foreign state,” that is, any state other than the state in which the non-profit is incorporated. Depending on the nature of the work performed by the remote worker(s), the number of remote workers in the foreign state, and how long they will be working in that state, the non-profit employer may need to “qualify” to do business in the foreign state.

Foreign qualification involves applying for authority to do business in the foreign state. The process usually requires filing an application for a certificate of authority with the foreign state, along with proof of good standing in the state of incorporation. Once qualified, the employer will face additional state compliance requirements such as filing annual or biennial reports and designating and maintaining a registered agent.

For example, if an Ohio company wishes to engage in intrastate business operations in Maryland, it must qualify with the Maryland State Department of Assessments and Taxation. To qualify, the company must certify its address, certify the name and address of its resident agent in Maryland, and provide evidence of its existence in its home state dated within 60 days of the date of filing.

This requirement often becomes apparent when an employer seeks to set up state payroll tax withholding – only to find it needs a foreign business registration. Payroll companies can often assist with such registration.



Workers' Compensation

When employees work remotely in other states the workers' compensation laws of those states may apply. Generally, employers are required to have workers' compensation coverage where their employees' work is localized. Determinations regarding where employees work typically include considerations of where employees are domiciled and spend a substantial part of their working time. Most often, remote employees are considered to be localized in the state where they work remotely.

Further, some states have reciprocal agreements with other states regarding when and how they accept out-of-state workers' compensation insurance. These agreements allow employers to bring employees temporarily into one state from a reciprocal state without purchasing in-state workers' compensation insurance. Employers wishing to take advantage will generally need to obtain extraterritorial coverage from their existing insurers and provide proof of the same to the remote employee's state agency.

A small minority of states also require employers to obtain disability insurance, which covers employees when an off-the-job accident or injury precludes work. Coverage can be obtained through a disability benefits insurance carrier authorized by the state's workers' compensation board to write such policies.

In Ohio, workers' compensation is a state-run monopoly. While the Ohio Bureau of Workers' Compensation ("BWC") generally provides coverage for employees of Ohio-based companies who work, temporarily or permanently, outside of Ohio, problems can arise when injured employees file their claims in states that do not recognize the BWC's coverage. This can lead to complications, including penalties for employers. Some states require Ohio employers to obtain workers' compensation coverage in their state, in addition to the BWC's coverage, for any work performed by their employees in that state. To address these issues, the BWC developed an optional Other States Coverage, which prevents coverage gaps and protects Ohio employers from penalties and stop-work orders in other states.

Ultimately, the answers to an employer's questions about workers' compensation will depend on what state(s) its new employees will be working remotely from, as it may need to consider obtaining workers' compensation insurance in those states. In states in which workers' compensation has been privatized, doing so may involve as little as getting in contact with one's workers' compensation insurance carrier and obtaining an extension of coverage to the out-of-state employee. However, because Ohio requires employers to apply for and obtain coverage directly through a designated state agency, its process is not as straightforward. As a result, Ohio employers are advised to consult with a qualified workers' compensation attorney as well as the Ohio BWC regarding these issues.

Independent Contractor vs. Employee Designation

Determinations regarding whether a remote worker should be classified as an "employee" or an "independent contractor" should be made on a position-by-position basis, as employers face significant liability exposure by classifying an individual as an independent contractor, rather than an employee.



Independent contractors are not eligible for workers' compensation coverage and employers are not required by state law to purchase coverage for them. Also, if an employee or former employee brings a claim for discrimination, failure to pay overtime, workplace injury, etc., a critical question will be "who is the employer?" and the answer will not necessarily be determined by agreements and documentation maintained by the employer - rather, the employee's classification will likely determine the answer.

Several tests exist for determining independent contractor status. The employer's degree of control over the individual is generally the major factor to consider; however, the totality of the circumstances determines the nature of the relationship. For the IRS, the general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. Further, the Department of Labor identifies the core factors for making the determination as being: (1) the nature and degree of the employer's control over the work and (2) the worker's opportunity for profit or loss based on initiative or investment. Employers should be aware of the pitfalls surrounding the independent contractor classification and take the necessary steps to be sure all remote workers who do not meet those tests are classified as "employees."

Health Insurance

Many health insurance providers offer nationwide coverage. However, employers are advised to consult with their providers regarding whether those providers provide coverage to the location(s) of the remote employee(s).

Taxes

Important to both employers and employees is where state and local taxes must be withheld and paid. Most states make it clear that only the state from which a remote employee is working may tax that employee's wage income, but some states have created exceptions for employees who spend a designated amount of time in the employer's home state.

Also, the state in which wages must be reported and in which unemployment tax is due might change as a result of remote work. To help employers make this determination, the Department of Labor's Localization of Work Provisions created a uniform four-factor test, which considers the following:

- Localization (where services are performed)
- Base of operations (established location where work begins and ends)
- Place of direction and control (where direction and control emanate from)
- Residence of the employee

The test is applied in a "waterfall" approach with the first factor answered affirmatively to be dispositive. For example, a determination of localization where services are performed *exclusively* in Oregon sets Oregon as the reporting state for wages and the payment of unemployment tax and requires no further analysis of the remaining factors.



Evaluating these issues in the context of COVID-19 and other circumstances surrounding the “work from home” boom creates some unique challenges, such as whether remote work performed in another state as a result of the pandemic is considered “incidental” or “temporary” as compared to the work the employee typically conducts in the original state. In making the necessary determinations, employers should consider factors such as (1) the intention of both the employer and the employee regarding where the employee’s work takes place on a regular basis; (2) whether the work performed outside of Ohio is the same as or different from the work that employee would be doing if he or she were working in Ohio; and (3) the length of any work completed for the employer within Ohio. Employers are advised to consult with a qualified tax attorney and employment attorney regarding these issues.

Conclusion

Ultimately, remote work raises many complex issues Ohio non-profit employers must consider. Steps employers can take include:

Examining the local employment laws of the state(s) in which the remote employees live and considering the potential need for foreign business qualification(s);

contacting the Ohio Bureau of Workers’ Compensation regarding whether the remote employees are covered under the employer’s existing policy or a new policy needs to be purchased;

designating appropriate remote workers as “employees” and not “independent contractors” for workers’ compensation purposes; and

importantly, getting in touch with their health insurance provider, a trusted tax expert, the local taxing authorities, and one or more trusted attorneys or law firms to ensure they are fully in compliance.

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[Cooper Bowen](#) is an experienced litigator, having represented governmental entities, their employees, and elected officials in cases involving civil rights, employment, and various other matters. He is also experienced in advising clients in contract, employment, risk management, and policy matters.